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Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-288

W. S. POTTS, *et al.*,

Petitioners,

—VS.—

ARLENE FLAX, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons Why the Writ Should Be Denied:	
I. The Court of Appeals Correctly Interpreted This Court's Decisions in *Swann* and Companion Cases in Requiring Further Desegregation of the Fort Worth School System	4
II. The Court of Appeals Properly Required the Inclusion of First Grade Students in the Desegregation Process	8
III. The Court of Appeals Properly Required Desegregation of the Vocational-Technical Schools	9
IV. Section 803 of the Education Amendments of 1972 Has No Application to This Case	10
V. There Is No Viable Class Action Issue	10
Conclusion	12

Table of Authorities

Cases:

Acree v. County Board of Educ. of Richmond County, 336 F. Supp. 1275 (S.D. Ga.), *aff'd* 458 F.2d 486 (5th Cir. 1972), *cert. pending,* Nos. 72-79 and 72-167 ..... 3n

PAGE

Cisneros v. Corpus Christi Independent School Dist., No. 71-2397 (5th Cir., August 2, 1972) 7
Clark v. Board of Educ., No. 72-1406 (8th Cir., August 21, 1972) 9
Clark v. Board of Educ., 426 F.2d 1035 (8th Cir. 1970) 6

Davis v. Board of School Comm'rs, 402 U.S. 33 (1971) 8n
Dowell v. Board of Educ., No. 72-1146 (10th Cir., August 4, 1972) 6
Drummond v. Acree, No. A-250 (September 1, 1972) 10
(Mr. Justice Powell, Circuit Justice)

Flax v. Potts, 450 F.2d 1118 (5th Cir. 1971) 3
Flax v. Potts, 333 F. Supp. 711 (N.D. Tex. 1970), construction enjoined, 450 F.2d 1118 (5th Cir. 1971) 7n

Green v. County School Bd. of New Kent County, 391 U.S. 430 (1968) 5, 9

Hall v. St. Helena Parish School Bd., 417 F.2d 801 (5th Cir.), *cert. denied*, 396 U.S. 904 (1969) 5
Harrington v. Colquitt County Bd. of Educ., 460 F.2d 193 (5th Cir. 1972) 9
Henry v. Clarkedale Municipal Separate School Dist., 409 F.2d 682 (5th Cir.), *cert. denied*, 396 U.S. 940 (1969) 7

Kelley v. Metropolitan County Bd. of Educ., 463 F.2d 732 (6th Cir. 1972) 6, 11
Kramer v. Union Free School Dist., 395 U.S. 621 (1969) 11n

Potts v. Flax, 313 F.2d 284 (5th Cir. 1963) 11

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) 3, 4, 6, 7, 8

PAGE

Thompson v. School Bd. of Newport News, No. 71-2032 (4th Cir., August 2, 1972) 9

United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (1966), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied sub nom.* Caddo Parish School Bd. v. United States, 389 U.S. 840 (1967) 4

United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972) 8n

Wright v. Council of the City of Emporia, 407 U.S. 452 (1972) 8n

Statutes:

Education Amendments of 1972, P.L. 92-318 ..... 2, 10

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Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit filed July 14, 1972, as amended on July 27, 1972, is unreported and is reprinted in the Appendix to the Petition at pages A-1 through A-12. The opinion of the district court entered July 30, 1971 is unpublished and appears at pages A-14 through A-42 of the Appendix to the Petition.

Prior reported opinions in this case appear at 450 F.2d 1118 (5th Cir. 1971); 313 F.2d 284 (5th Cir. 1963); 333 F. Supp. 711 (N.D. Texas 1970); and 204 F. Supp. 458 (N.D. Texas 1962).

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the Court of Appeals erred in holding that the Fort Worth school system was not yet unitary, where nearly 57% of its black students attended virtually all-black schools.

2. Whether the Court of Appeals erred in overturning the district court's action exempting all first graders from inclusion in the desegregation process irrespective of the particular time or distance any individual student or group of students of any age might have to be transported.

3. Whether residential segregation in Fort Worth, which predated the commencement of this litigation and which continues virtually unabated to any substantial degree, excuses the school authorities from dismantling segregated units of their former dual school system which are located in segregated neighborhoods.

4. Whether Section 803 of the Education Amendments of 1972, P.L. 92-318, applies to district court orders designed to remedy unlawful segregation and not to achieve racial balance.

5. Whether a class action to desegregate the public schools may be maintained.

Statement of the Case

The section of the Petition entitled "Statement of the Case" (pp. 6-14) is, to quote another district court, a "mishmash and embranglement"[1] of fact, argument and conclusion dealing with matters within and without the record, some litigated and some ignored by Petitioners below, and either relevant or irrelevant to a consideration of this matter. Respondents will make no attempt to contradict every misrepresentation. The uncontested facts are that this lawsuit to desegregate the public schools of Fort Worth, Texas was commenced in 1959 and followed a now familiar course through freedom of choice and other ineffective desegregation plans. In 1970, the district court denied relief sought by plaintiffs with the filing of a motion for further relief; following this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1 (1971), the Court of Appeals remanded for compliance with the principles enunciated in *Swann*. 450 F.2d 1118.

The Board then proposed a cluster plan involving some 27 elementary schools, designed to desegregate six virtually all-black elementary schools, and to produce desegregation at the secondary grade levels through the operation of a pre-existing feeder pattern determining attendance at middle and high schools based upon attendance at a particular elementary school. Kindergarten and first grade students were to be excluded from the desegregation clusters. The Board did not propose to take any steps to bring about substantial desegregation of other all-black or virtually all-black or all-white schools in the Fort Worth system.

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[1] *Acree* v. *County Board of Educ. of Richmond County*, 336 F. Supp. 1275 (S.D. Ga.), *aff'd* 458 F.2d 486 (5th Cir. 1972), *cert. pending*, Nos. 72-79 and 72-167.

Nevertheless, the plan was approved by the district court on the ground that Fort Worth had operated a unitary school system since a *Jefferson*[2] decree was entered in 1967; and that the black schools which were to remain unaffected by the desegregation plan did not owe their racial composition to any state action maintaining the dual school system—despite the fact that no substantial desegregation of Fort Worth schools occurred under freedom of choice.

Reasons Why the Writ Should Be Denied

I.

The Court of Appeals Correctly Interpreted This Court's Decisions in *Swann* and Companion Cases in Requiring Further Desegregation of the Fort Worth School System.

As we understand the Petition, the school board contends that the judgment below exceeds the remedial authority confirmed by *Swann* in several respects, each of which we discuss *seriatim*:

1. The school board agrees it must desegregate schools which were black before this suit commenced, and remained black through 1971-72. However, as to those schools which in 1971-72 were virtually all black, but had earlier been restricted to white students, the school board contends it has no constitutional obligation because the racial composition of these schools was determined by other than school board action (residential mobility) "after the dual

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[2] *United States* v. *Jefferson County Bd. of Educ.*, 372 F.2d 836 (1966), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied sub nom. Caddo Parish School Bd.* v. *United States*, 389 U.S. 840 (1967).

system had been voluntarily eliminated by the Board." (Petition, p. 4). The district court accepted this argument, but the Court of Appeals did not.

The initial difficulty with the hypothesis is that no affirmative action was taken by the Board to eliminate the black schools *which it agrees are vestiges of the dual system* (those included within its cluster plan approved by the district court) until the 1971-72 school year; thus, any changes in the racial composition of other schools did not occur "after the dual system had been . . . eliminated."[3] The Court of Appeals was plainly correct in rejecting the district court's holding that these schools' racial composition was the "result of desegregation instead of segregation" (A-39),[4] based as it was upon the district court's conclusion that Forth Worth had operated a "unitary" school system since free choice was instituted in 1967 (A-15). *E.g., Green* v. *County School Bd.*, 391 U.S. 430 (1968); *Hall* v. *St. Helena Parish School Bd.*, 417 F.2d 801 (5th Cir.), *cert. denied*, 396 U.S. 904 (1969). Further-

[3] In the district court and the Court of Appeals, the Board argued with little substantiation that the black schools it was not including in its desegregation plan had become black schools since 1967 (See A-39, where the district court distinguishes schools which were white "under the dual system," which the court held lasted until 1967, A-15; A-7, where the Court of Appeals summarizes the school board's contentions centering around the 1967 conversion to a "unitary" school system). However, in this Court the Board contends only—and rather vaguely—that some of the schools became identifiably black schools "between 1963 and 1970" (Petition, p. 14) while others "have been in the process" for "12 years"—or prior to the effective date of the first order in this case (See A-14). As we discuss in the text, *infra*, whenever those changes in racial composition did occur, they were accompanied by school board actions such as eliminating optional zones which kept white schools white until neighborhoods had completely changed, or reassigning black faculty to what was now to be a black school.

[4] Citations are to the Appendix to the Petition.

more, the Court of Appeals' review of the evidence convinced the panel that the schools had become identifiably black even prior to the year when the district court and the school board contended a unitary system had first been established (A-7).[5] Finally, although the Court of Appeals did not specifically discuss it, the record reveals the manner in which the school board contributed to the establishment of these facilities as black schools through manipulation of optional attendance zones, assignment of black faculty to match black student bodies, etc. There was no affirmative school board action to eliminate racially identifiable faculties, see *Swann*, 402 U.S. at 18, until 1971-72 (A-27 to A-29).

The arguments made by the Board have been rejected in other Circuits. *E.g., Kelley* v. *Metropolitan County Bd. of Educ.*, 463 F.2d 732, 744 (6th Cir. 1972) ("The fact that population shifts in the metropolitan school district have helped to some degree to change the racial composition of some schools during the course of litigation does not eliminate the duty of the school board to present a plan for a unitary school system"); *Clark* v. *Board of Educ.*, 426 F.2d 1035 (8th Cir. 1970); *Dowell* v. *Board of Educ.*, No. 72-1146 (10th Cir., August 4, 1972).

2. The school board argues that the Court of Appeals erred in requiring the desegregation of three schools which are located in segregated black neighborhoods (Petition, p. 13) which, it suggests, result solely from the exercise of choice by blacks. Putting to one side the total lack

[5] The Court of Appeals' reference to "nine of the eleven elementary schools" (A-7) does not indicate that the other two were not identifiably black schools before 1967, but only that they were not "virtually all-black," words which have become a phrase of art in the Fifth Circuit indicating schools 90% or more black. See A-6, n.6.

of any credible evidence introduced by the Board below to substantiate such a claim, the Court of Appeals' out-of-hand rejection of this contention (A-8) as a matter of law is warranted by the decision in *Swann* and other precedent. *E.g., Henry* v. *Clarksdale Municipal Separate School Dist.*, 409 F.2d 682 (5th Cir.), *cert. denied*, 396 U.S. 940 (1969). Residential segregation in Fort Worth predates this lawsuit and the school board was well aware of it in designing its segregated "neighborhood" zones.[4] But desegregation plans "cannot be limited to the walk-in school." *Swann*, 402 U.S. at 30.

3. The school board seems to argue, finally, that the judgment below exceeds the *Swann* guidelines of practicality and feasibility because of the burden upon the school system (Petition, pp. 13-14). Apart from the rather astounding inflation in the board's estimates of required transportation facilities (between the time when the school officials thought they had about a month to design and implement an effective plan, and the time when they were granted an additional semester within which to complete the process), the hardship claims are at this time entirely unsubstantiated. The school board has not yet filed a plan in accordance with the remand instructions below, nor have any hearings been held. The board will have available to it when it does so, guidelines recently issued by the Fifth Circuit *en banc* for the preparation of desegregation plans so as to minimize pupil transportation and expense. See *Cisneros* v. *Corpus Christi Independent School Dist.*, No. 71-2397 (5th Cir., August 2, 1972). In the absence of a

[4] Thus, for example, the school board defended its proposal to build a segregated high school in the all-black Morningside area on the grounds that this community was enttiled, like all others in Fort Worth, to have its own segregated schools. See 333 F. Supp. 711, *construction enjoined*, 450 F.2d 1118.

concrete desegregation plan given court approval and direction for implementation, one may hardly make a judgment that the practical limitations recognized by *Swann* have been ignored!

II.

The Court of Appeals Properly Required the Inclusion of First Grade Students in the Desegregation Process.

Petitioners can suggest no compelling reason for the blanket exclusion of first grade students from the desegregation process which was accepted by the district court. Certainly there is nothing in the record as it now stands to suggest that any first grade student would have to be transported 20 miles; should that eventuality come to pass, the particular circumstances can be considered in light of this Court's recognition in *Swann* that the age of the student is a factor to be taken into account in determining feasibility and practicability of desegregation plans utilizing transportation.

First grade students were historically part of school district segregation plans which often required blacks to attend distant segregated facilities, and first grade students have routinely been included in many desegregation plans approved by this Court and the lower federal courts, including those in Charlotte, Mobile, Emporia and Scotland Neck.[7] In addition, other Circuits which have addressed the issue have rejected the contentions pressed

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[7] *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Davis* v. *Board of School Comm'rs*, 402 U.S. 33 (1971); *Wright* v. *Council of the City of Emporia*, 407 U.S. 452 (1972); *United States* v. *Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972).

by the Board. *Clark* v. *Board of Educ. of Little Rock*, No. 72-1406 (8th Cir., August 21, 1972); *Thompson* v. *School Bd of Newport News*, No. 71-2032 (4th Cir., August 2, 1972).

III.

The Court of Appeals Properly Required Desegregation of the Vocational-Technical Schools.

The district court permitted the continued operation of I.M. Terrell (High) School as an all-black facility, which it found was one of "only two such [vocational high] schools in the whole system" (A-39) because the two vocational schools were open to enrollment by all students. This reliance upon a free choice situation despite its ineffectiveness is clearly insufficient. *Green* v. *County School Bd., supra,* and the Court of Appeals properly required desegregation of the technical schools (A-8).

The Court below has not, as the Board argues (Petition, pp. 4, 12-13), required that black students be deprived of a vocational education. Indeed, any plan to "desegregate" Terrell by denying black students the right to vocational training would be unconstitutional. See, *e.g., Harrington* v. *Colquitt County Bd. of Educ.*, 460 F.2d 193, 196 n. 3 (5th Cir. 1972). All that the Court below has required is that the Fort Worth school system's vocational and technical courses of study be desegregated.

IV.

Section 803 of the Education Amendments of 1972 Has No Application to This Case.

Petitioners have not sought a stay of the judgment below. Under the normal schedule of this Court, it is entirely possible, and likely, that ultimate review by this Court will be foreclosed by denial of this Petition prior to the scheduled implementation of desegregation in Forth Worth pursuant to the judgment below. Under these circumstances, Section 803 of the Education Amendments of 1972, P.L. 92-318, has no application here.

Furthermore, for the reasons stated by Mr. Justice Powell in *Drumond* v. *Acree*, No. A-250 (September 1, 1972), that section does not apply to the decrees below, which are designed to achieve desegregation of a formerly dual school system rather than a racial balance.

V.

There Is No Viable Class Action Issue.

Finally, the Board argues for the first time in this Court that there is a standing problem. The argument is that, the original named plaintiffs in this class action no longer attending Fort Worth schools, the real plaintiff is the "NAACP of New York" which has no standing to prosecute the lawsuit.

The facts are these: of the two original plaintiffs, one testified (without any indication that he understood the technicalities of class action suits in federal court) that he was prosecuting the case for his own children only (in reality, he was hesitant to "speak for" others); the other

was not questioned on the subject. The Court of Appeals held the case was properly brought as a class action. 313 F.2d 284. In 1967, the children of the Fort Worth attorney representing the original plaintiffs intervened as plaintiffs in the suit; they remain in Forth Worth and are eligible to attend the Fort Worth public schools.[8] Finally, respondents are preparing the necessary papers at this time to intervene additional infant children attending Fort Worth schools as plaintiffs in the district court so as to remove any doubt whatsoever. But as another Court of Appeals has said in rejecting a similar claim,

> . . . we note that this issue was clearly waived by failure of appellants [the school board] to raise it prior to trial and final adjudication of this case.
>
> We also note that such a class action as this dealing with continuing constitutional violations does not become moot because of years of delay (much of it attributable to appellants) which occasioned the graduation of the named, original student plaintiffs from the school system before final decision.

Kelley v. *Metropolitan County Bd. of Educ., supra,* 463 F.2d at 743.

[8] These children today attend non-public schools, but they remain eligible to enroll in Fort Worth public schools and continue to have an enforceable interest in the constitutional operation of the public school system. *Cf. Kramer* v. *Union Free School Dist.,* 395 U.S. 621 (1969).

CONCLUSION

WHEREFORE, for the foregoing reasons, respondents respectfully pray that the Writ be denied.

Respectfully submitted,

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